No. 80-920.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

SOUTH SHORE HOSPITAL,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Reply Brief for Petitioner.

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February 17, 1981

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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In its Brief in Opposition respondent argues, for the first time, that petitioner's alleged violation of § 8(a)(3) of the National Labor Relations Act was based upon its spokesmen's statements at the bargaining table, rather than upon petitioner's contemporaneous refusal to bargain in good faith (Br. in Opp. 5). Neither the Board nor the Court of Appeals so ruled. The Board concluded that petitioner's unlawful motivation was demonstrated by the same evidence that established petitioner's refusal to bargain in good faith (Pet. App. 59a-60a, 64a-66a). Similarly, the Court of Appeals upheld the finding

of unlawful motivation on the basis of petitioner's "piecemeal bargaining strategy": in other words, "its bad faith refusal to make a wage and benefits counterproposal" (Pet. App. 12a-13a). Respondent also puts forth the novel theory that the Board would have reached the same § 8(a)(3) conclusion even in the absence of bargaining (Br. in Opp. 5). However, neither the Board nor the Court below relied upon this theory. Accordingly, to the extent respondent raises arguments for the first time in this Court, they should not be accepted. *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 444 (1965).

Because respondent concludes erroneously that the bargaining context in which this case occurred is irrelevant to the Board's § 8(a)(3) determination, it contends that *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), does not proscribe the Board's make whole order in this case (Br. in Opp. 6-7). However, the findings below, when read properly, clearly show that this case raises fundamental questions about the meaning of § 8(d) and this Court's decision in *H.K. Porter*.

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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